CTAP CASELAW UPDATES[1] – APRIL 2008

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Takings

Seven Up Pete Venture, et al. v. Schweitzer (9th Circ., on appeal from the United States District Court of Montana, April 21, 2008)

Summary: 9th Circuit holds that states and/or state officials acting in their official capacities are immune from federal Fifth Amendment takings claims in federal court.

Plaintiffs purchased six leasehold interests in state-owned mineral estates in 1991, planning to extract gold and silver through open-pit and cyanide leaching mining operations. Although the plaintiffs engaged in discussions with the State regarding their pending permits and began environmental review, no permit was issued for the projects. In 1998, the citizens of Montana passed ballot initiative I-137, which banned cyanide leach mining, with a grandfather clause for any mining operating as of the date the initiative was passed. Plaintiffs thereafter filed suit against the governor of the State of Montana and the director of the Montana Department of Environmental Quality in both federal and state court, claiming I-137 and the state's refusal to issue a permit after its passage effectuated a taking of their property, as no other mining processes would "allow economically viable production of the gold and silver" in the project.

The federal district court stayed the plaintiffs' Fifth Amendment takings claims, finding those claims not ripe for review until plaintiffs exhausted their state court claims. (*Citing Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985).) In 2005, the Montana Supreme Court granted summary judgment for the state on the Fifth Amendment claims, holding that the plaintiffs were not entitled to a mining permit as a matter of law with or without I-137, and therefore could not demonstrate the loss of a vested property right. The federal district court thereafter reopened the case and dismissed the claims on grounds of 11th Amendment immunity; and alternatively, that the claims were barred by issue preclusion in light of the state court's decision, citing the intervening decision *San Remo Hotel L.P. v. City & County of San Francisco*, 545 U.S. 323, 340-348 (2005) (applying issue preclusion to bar a federal takings claim after plaintiffs lost the same claim in state court).

The appellate court upheld the district court, confirming that the claims against the Montana state officials were barred by 11th Amendment sovereign immunity. The appellate court held that the self-executing nature of the Fifth Amendment's taking clause does not alter the application of the 11th Amendment, and joined the 1st, 5th, 6th, 7th, and 11th Circuit Courts of Appeals in holding that

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"[The State] enjoys sovereign immunity in the federal courts from [a] federal takings claim…" The appellate court also held that such a claim cannot be characterized as a prospective injunctive relief against future wrongs by individual state actors per the *Ex Parte Young* doctrine, as a takings claim by its very nature seeks damages for the unconstitutional denial of just compensation. Because it confirmed the district court's judgment on this ground, the appellate court did not reach the question of issue preclusion.

Environmental Law

Kotrous v. Bayer Cropscience, Inc. (9th Circ., on appeal from the United States District Court for the Eastern District of California, April 17, 2008)

Summary: 9th Circuit rules that a potentially responsible party (PRP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that incurs costs voluntarily, without having been subject to a civil cleanup action under the statute, may bring a suit under § 106 or § 107 of the Act against other PRPs for full recovery of its costs.

Two separate non-polluting PRP landowners sought recovery against other former and current PRPs for costs incurred in voluntarily performing site investigation and identifying the PRPs responsible for contamination of their properties. At the time they filed their claims, the 9th Circuit cases limited recovery by a PRP to contribution only, as all PRPs are considered joint and severally liability for site cleanup. During the pendency of the claims, the U.S. Supreme Court decided *United States v. Atlantic Research Corp*., 127 S.Ct. 2331, 2333 (2007), holding that PRPs can seek a cause of action to recover costs, not just for contribution. Accordingly, the 9th Circuit followed this precedent, clarifying that if a PRP has paid to satisfy a settlement agreement or court judgment in a CERCLA action, it may only seek contribution, but if it incurs voluntary investigation and cleanup costs, it may seek recovery.

Cameron Springs, LLC v. Montana Dept. of Environmental Quality (District Court of the First Judicial District of Montana, April 23, 2008)

Summary: Judge Sherlock of First District Court orders Montana Department of Environmental Quality (DEQ) to applicant for gravel pit operation in Belgrade, where DEQ failed to prepare required environmental analysis within 60-day statutory time frame.

The Open Cut Mining Act (Sections 82-4-401, *et seq*., MCA requires operators of proposed gravel pit operations to obtain a permit from DEQ. Upon receipt of a permit application, the department has 30 days, with an option for one 30-day extension, to "review the application, inspect the proposed site, and notify the person whether or not the department believes that the application is acceptable." (Sections 82-4-432(4)(a) and (c), MCA.) The Montana Environmental Policy Act (Sections 75-1-101, *et seq*., MCA) (MEPA), requires that all state agencies analyze the environmental impact of any proposed action; any adverse environmental effects that cannot be avoided if the proposal is implemented; and the alternatives to the proposed action; any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed; the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-

term productivity; any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented; the customer fiscal impact analysis, if required; and the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal. (Section 75-1-201(1)(b)(iv), MCA.) The agency has 60 days to complete a public scoping process; 90 days to complete an environmental assessment; and 180 days to complete an environmental impact statement. (Section 75-1-208(4), MCA.)

In October 2007, the plaintiff submitted an application for a permit to operate a gravel pit near Belgrade. In December 2007, the plaintiff had submitted all accompanying documents required by the statute, and in January 2008 DEQ informed plaintiff that the application was "accepted" subject to completion of environmental review. In the interim, Gallatin County began to consider a request for an emergency zoning district submitted by neighbors opposed to the proposed gravel pit. In response to this development, the plaintiff sought a writ of mandate from the court, requesting the court order DEQ to issue the permit, as the 60-day statutory review period had passed.

The court issued the writ, ordering DEQ to issue the permit. The court noted that MEPA requires agencies to conduct environmental review required under Section 75-1-201 "to the fullest extent possible," and concluded that such general language was controlled by the more specific language of Section 82-4-432, MCA to finish review and determine whether the application was acceptable within 60 days. The applicant was therefore entitled to the performance of a clear legal duty by DEQ. Because of the pending emergency zoning regulations could prohibit the proposed operations, the applicant had no other speedy or adequate remedy at law and were entitled to a writ of mandate ordering DEQ to issue the permit.

Note: Several other writ petitions from similarly situated gravel pit applicants were filed with the First District Court after this one, but the decisions were handed down in May. They will be reviewed in next month's legal update.

Humane Society of the United States, et al. v. Gutierrez (9th Circ., emergency motion for a stay pending appeal, April 23, 2008)

Summary: 9th Circuit grants stay of National Marine Fisheries Service (now known as NOAA Fisheries) approval for the States of Washington and Oregon to lethally remove up to 85 California sea lions preying on listed salmon in the Columbia River below the Bonneville Dam during the 2008 salmon run.

Plaintiff animal rights group sought to stay lethal removal of California sea lions from the Columbia River, an action pursued by the states of Washington and Oregon to protect listed salmon species on which the sea lions prey. Because the killing of the marine mammals is irreparable, the stay of the approval will affect only this year's salmon run, and all parties anticipate the 2008 salmon run to be much larger than in previous years, the appellate court issued the stay.

National Wildlife Federation et al. v. State of Idaho (9th Circ., on appeal from the United States District Court for Oregon, April 9, 2007, amended April 24, 2008)

Summary: 9th Circuit rejects latest NOAA Fisheries Biological Opinion for federal Columbia River operations, finding the Opinion improperly determined such operations would not jeopardize the survival or recovery of eight listed salmon and steelhead species.

In 1993, the National Marine Fisheries Service (now known as NOAA Fisheries) issued a Biological Opinion (the 1993 BO) for the Federal Columbia River Power System (FCRPS), finding that FCRPS operations would not jeopardize the threatened Snake River fall Chinook salmon population. The Idaho Department of Fish and Game filed suit against the 1993 BO, and after litigation and subsequent agency actions, NOAA Fisheries issued a new Biological Opinion (the 2000 BO). The 2000 BO determined that continuing FCRPS operations as proposed would jeopardize eight listed salmon and steelhead species, but found that off-site mitigation activities unrelated to FCRPS operations would avoid such jeopardy.

The plaintiffs in the instant case challenged the 2000 BO, and the federal district court of Oregon ruled that the 2000 BO was arbitrary and capricious because the off-site mitigation activities upon which it relied were not certain to occur and were not subject to consultation with NOAA Fisheries as federal actions. The court remanded the 2000 BO to the agency in response to its decision, but kept the 2000 BO in effect in the meantime. Upon remand by the court, NOAA Fisheries issued a revised Biological Opinion (the 2004 BO). The 2004 BO assumed as environmental baseline the existence of various "nondiscretionary" activities in the Columbia River system, including the continued operation of the dams along the river, irrigation operations, flood control, and power generation. Thus, these aspects of FCRPS operations were not considered part of the proposed "discretionary" operations that the 2004 BO analyzed for impacts on the listed fish species. The plaintiffs challenged the 2004 BO as an inadequate response to the court decision on the 2000 BO. The district court granted summary judgment for the plaintiffs, finding the 2004 BO invalid, and issued a preliminary injunction requiring NOAA Fisheries to increase flow and spill at certain FCRPS dams. The agency appealed this decision to the 9th Circuit Court of Appeals.

The appellate court upheld the district court's rejection of the 2004 BO. NOAA Fisheries may not exclude the effects of purported "nondiscretionary" agency actions from jeopardy analysis review. Because this approach had never been taken before, and constituted a "drastic change" from the previous approaches in the 1993 and 2000 BOs, it did not merit *Chevron* deference. Unless an agency is directed by statute to perform *specific nondiscretionary actions*, proposed agency actions are to be regarded as discretionary and reviewed as such in NOAA Fisheries' jeopardy analysis. The appellate court emphasized that "[Endangered Species Act] compliance is not optional."

The appellate court also held that the 2004 BO improperly failed to incorporate degraded baseline conditions into its jeopardy analysis. Where baseline conditions already jeopardize a species, NOAA Fisheries must consider the effects of the proposed agency action in the context of those existing conditions; here, the operations of the dams along the Columbia River and the existing jeopardy that those operations have placed the listed fish species.

The 9th Circuit court also held that the 2004 BO improperly based its jeopardy analysis on the effects of the proposed actions on the fish species' survival alone, as opposed to survival and recovery needs. It also held that the 2004 BO failed to ensure that proposed FCRPS operations would not destroy or adversely modify critical habitat for any of the listed fish species. The 2004 BO failed to consider the proposed operations short-term negative effects in the context of the species' short life cycles and migration patterns; improperly relied on uncertain long-term improvements to critical habitat to off-set short-term degradation, and arbitrarily concluded that the existing critical habitat was sufficient for recovery.

Finally, the appellate court upheld the district court's requirement that NOAA Fisheries consult on remand with the States of Idaho, Montana, Oregon, and Washington, and any Tribes involved in the litigation, in developing a new Biological Opinion.

Bering Strait Citizens for Resp. Resource Dev. v. U.S. Army Corps (9th Circ., on appeal from the United States District Court for Alaska, January 3, 2008, amended opinion, April 30, 2008)

Summary: 9th Circuit amended the prior opinion (see CTAP Legal Update January 2008) with respect to its discussion of the adequacy of the Army Corps of Engineers' analysis of cumulative impacts for two open-pit gold mines in Alaska, but the decision upholding the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued by the agency for the project the remains unchanged.

Real Property Law

Our Lady of the Rockies, Inc. v. Peterson, et al. (Montana Supreme Court, 2008 MT 110, on appeal from the District Court of the Second Judicial District of Montana, Silver Bow County, April 1, 2008)

Summary: Montana Supreme Court rules that the federal government did not expressly reserve a public road across private property by reference in an 1896 federal land patent to a mineral survey that depicted a road labeled simply "Road." In order for an easement to be created by reference to a recorded plat or certificate of survey, the plat or survey must clearly describe the extent of the easement in order to provide adequate notice to the property owner or purchaser of the burdened property.

Private citizens are legally authorized to enter federal lands to explore for valuable mineral deposits. (30 U.S.C. §§22, *et seq*. (General Mining Act of 1872).) If and when the citizen locates a valuable mineral deposit, a mining claim may be filed, and perfected by staking it and complying with other requirements. The area then becomes the property of the claimant and ceases to be public land, but the United States still retains title to the land. The claimant may obtain fee title to the land by applying to the U.S. Department of Interior for a mining patent. Among other requirements for obtaining such a patent, the applicant must file a survey and field notes of the claim made by the U.S. Surveyor General showing boundaries and monuments. If the patent is issue, title is deemed issued to the claimant as of the date the original mining claim was made.

The instant case, the first of two April decisions from the Montana Supreme Court analyzing the state's easement-by-reference doctrine, involves three adjacent mining placers in Silver Bow County. Two of them are owned by the plaintiff non-profit corporation; the third was previously

subdivided into lots now owned by the defendant landowners. The plaintiff plans to construct a tram, tramway station, parking lot, carousel, amusement park rides, and other tourism-related improvements on one of their two placers. The tram is intended to provide access to the Our Lady of the Rockies statue at the top of the mountain, with an estimated ridership of 14,000 to 60,000 in the first year of operation. Plaintiffs' plans were to provide public access to the tramway station along a road that historically traversed the three placers, as shown on all three mineral surveys completed for the patent application for each placer. In its current condition, the road is paved at its entrance to the defendants' parcels, then becomes a 12-foot wide dirt road as it traverses across the four private parcels, finally reaching a metal gate at the fourth landowner's property. Thereafter, it is an unmaintained, single-track lane across the two parcels owned by the plaintiff.

The plaintiff filed suit against the defendant landowners, seeking a declaratory judgment that the stretch of road traversing the defendants' placer is a public road, 60 feet in width, available for all uses of a public road by the public, based on congressional dedication or grant; common-law dedication; or express reservation on the mining patent. The district court granted summary judgment to the plaintiffs, holding that a public road across defendant's property was created by by express reservation in the mineral survey completed for defendants' placer claim. Because the placer "belonged" to the federal government when it was surveyed in 1893, the district court reasoned, any road on that land was public. Further, it traversed defendants' placer to access plaintiff's two placers, which at the time were still owned by the federal government and were therefore public. Finally, the district court noted that various surveys and maps over the last century identified the road, and at times referred to it as "public." With respect to plaintiffs claims that the road was public based on congressional grant, or common-law dedication, the district court held there remained factual issues that could not be resolved on summary judgment. The defendants appealed the decision to the Montana Supreme Court.

The Supreme Court reversed the district court, holding that neither federal law nor state law supports plaintiff's express-reservation theory. Although the Court agreed the mineral survey for defendants' placer and its field notes – which referenced the existing road across the three placers and described its general location – were part of the patent for defendants' placer, the Court found the reservation language insufficient to establish a public road under federal law. The patent expressly granted a right of way for ditches, canals, and mining deposits, but not any road. Since surveyors in 1890 were required to note most physical objects and data during a survey, the Supreme Court held that the survey's reference to a "Road" was merely a means to identify the premises as required by the surveyor's manual requirements at the time. The Court noted that even if they concluded an express reservation of a public road existed, no federal authority existed at that time to make such reservation, and it would therefore be void.

Alternatively, the plaintiffs asserted that under current state law, the public road easement across defendants' placer was created by express reservation through reference to a plat or certificate of survey describing the easement. The Court likewise rejected this argument, holding that the patent is governed by the law in effect at the time the patent was issued. No law or other authority in effect in 1896 supported the easement by reference doctrine. Further, the Court emphasized that in determining the existence of an easement by reference, the grantee whose property is to be burdened with the easement must have knowledge of it. Because the mineral survey for defendant's patent did not "clearly show" or "adequately describe," it did not impart

constructive knowledge to the defendants and their predecessors, and no public road easement was therefore created by reference to that survey. The Court also noted that the easement-by-reference doctrine serve only to create private, not public, easements.

Knutson v. Schroeder (Montana Supreme Court, 2008 MT 139, on appeal from the District Court of the Seventh Judicial District of Montana, Richland County, April 22, 2008)

Summary: Montana Supreme Court reiterates that when public roadway is abandoned, each adjacent owner takes to centerline of roadway as it existed at the time of abandonment; the interest therein can be extinguished or modified by an earlier abandonment or conveyance.

Adjacent property owners disputed title to an abandoned roadway separating their lots. The original owner of both lots had dedicated the 80-foot road right-of-way to the public as part of the creation of the original townsite in which one of the lots was located. Shortly thereafter, that same owner requested and obtained the County's abandonment of the northern 50-feet of the road, which he then subsequently transferred by deed to the predecessors-in-interest of the plaintiffs. Two years after that, he requested and obtained the County's abandonment of the remaining 30 feet of the road. The owners of one of the parcels also claimed that the original owner of the other had granted them an oral easement to access irrigation waters on the other property for their use. The owners of the other property, conversely, claimed they had established a prescriptive easement to use the abandoned roadway area held by the defendants.

The district court held that the subsequent owners of the two properties each held legal title to the remaining 15 feet on either side of the centerline of the abandoned road, and that the access granted for use of the irrigation waters was a revocable license only. The defendants appealed the decision, claiming that they were entitled to entirety of the remaining 30-feet of the original 80-foot easement. The Montana Supreme Court rejected this argument, holding that the original interest was extinguished by the earlier abandonment, and defendants were entitled to only one-half of the remaining 30 foot roadway (Section 70-20-307, MCA). The Court also held that the evidence supported the district court's finding that the plaintiffs had established a hostile prescriptive easement over the other owner's 15-foot section of that abandon roadway, and that the defendants had established nothing more than a revocable easement to access the irrigation ditch on plaintiffs' property.

Eastgate Village Water and Sewer District Assoc. v. Davis (Montana Supreme Court, 2008 MT 141, on appeal from the District Court of the First Judicial District of Montana, Lewis and Clark County, April 22, 2008)

Summary: A private non-profit water and sewer association has the power to forbid privately operated irrigation wells located on property within its jurisdiction that are not connected to its water system.

In 1978, the Lewis and Clark County Commission created the Lewis and Clark County Rural Special Improvement District (RSID) to construct and install parks, streets, and a water and sewer system for the Eastgate Village subdivision. The system provides water to over 600 homes and 2,000 residents located within Eastgate. Shortly thereafter, the residents of Eastgate created the five-board member Eastgate Village Water and Sewer Association to oversee the maintenance, repair, and operation of the water and sewer system. The Association filed articles of

incorporation with the Secretary of State, and adopted bylaws governing the use and utilization of water; handling and disposition of sewage; all matters necessary or incidental to the maintenance, repair, preservation, and operation of the sewer and water system; and the authority to adopt reasonable rules for water use and penalties for failure to comply with those rules.

In the summer of 2003, in response to drought conditions, the Association instituted temporary water restrictions limiting the days that Eastgate residents could water their lawns in order to preserve sufficient water pressure for drinking, household uses, and fire suppression. The Association also voted to ban the drilling of private wells within the subdivision to avoid the possibility of cross-contamination of the drinking water supply. The following summer, the defendants nevertheless arranged for a contractor to drill a well on their property for lawn and garden irrigation purposes and obtained a Certificate of Water Right from the DNRC. The well was drilled into the same aquifer used by the Association. The Association sent a cease-and-desist letter to the defendants, demanding they abandon the newly drilled well. When the defendants refused, the Association filed suit to declare the well ban valid and enforceable, and seeking a court order requiring the defendants to abandon the well. The district court granted summary judgment in favor of the Association, finding the well ban rule valid and enforceable and ordering the defendants to permanently abandon their well.

The Montana Supreme Court affirmed. Every member of the subdivision is a member of the Association, and each landowner is in a contractual relationship with the Association and bound by the Association's rules. A member of an association is entitled to all the benefits of membership but also subject to the obligations of membership. Since the rule banning private wells was directly related to the Association's responsibility to protect Eastgate's water system – private wells pose the possible danger of cross-contamination of the subdivisions drinking water source – each member was obligated to follow that rule. Under state statute, even the possibility of a cross-connection poses a threat to a water system. (Section 75-6-102(5), MCA.) In addition, the private well posed a threat of depletion to the aquifer used by the Association for Eastgate's watering needs. Therefore, the ban was reasonable in light of the Association's duty to preserve Eastgate's water supply.

Blazer v. Wall (Montana Supreme Court, 2008 MT 145, on appeal from the District Court of the Eleventh Judicial District of Montana, Flathead County, April 29, 2008)

Summary: An express easement cannot be created by reference to a survey for the benefit of properties not identified on that survey, and extrinsic evidence as to the intent of the grantor cannot be used to establish the extent of such an easement. The extent of the use and the properties burdened and benefitted by the easement must be clearly set forth on the recorded plat or survey referenced in the recorded deed.

The second of two easement-by-reference cases decided by the Montana Supreme Court in April 2008. In this case, plaintiff claimed a 30-foot easement through an adjacent parcel to reach several properties he owned that he had purchased from the original owner of the burdened property, but only one of which was shown on the same certificate of survey as the parcel burdened by the easement. The instrument of conveyance for the burdened parcel legally described the parcel being conveyed as "Tract 1 of Certificate of Survey No. 4446. SUBJECT TO 30 foot road easement as shown on Certificate of Survey No. 4446, records of Flathead County Montana."

The defendants, now owners of the burdened parcel, claimed that this language was not sufficient to incorporate the survey by reference into the deed.

Both the district court and the Montana Supreme Court disagreed, finding such language sufficient to incorporate the survey into the deed for purposes of the easement-by-reference doctrine. However, the Montana Supreme Court held that an easement road depicted on a survey and reserved by reference to that survey in the deed cannot, without more, benefit property not shown on that deed. With respect to those of plaintiff's properties not described in defendant's deed or shown on the survey referenced in that deed, no easement by reference could be established. In order to put the owner of the burdened property on notice as to the extent of the easement, the dominant tenement(s) benefitting from the easement must be identified either on the deed or on the survey referenced therein.

The Court also held that the reference to the easement in the deed and on the survey was not sufficient to establish an easement across defendant's property for the use of plaintiff's final parcel that *was* identified on the survey. Here, the survey identified a 30-foot easement across both defendant's and plaintiff's properties, then continuing to unidentified off-survey properties. Since the intended use of the easement could have been to grant plaintiff access to his property across defendant's property (making defendant's property a servient tenement), or to grant defendant and plaintiff access to off-survey properties (making both properties dominant tenements), the Court held that the reference was insufficient to establish an easement benefitting either party.

Finally, the Court held that testimony from the original owner of the lots as to his intent in reserving the easement was improperly considered by the district court in violation of the statute of frauds. In Montana, an easement by reference may only be granted or reserved in writing, and extrinsic evidence may not be used to provide the property description or add terms to an insufficient description. "Good-faith purchasers of real property…are entitled to rely on publicly recorded deeds, plats, and certificates of survey pertaining to the subject property to disclose accurately all encumbrances, easements, and impediments thereon." In order to grant or reserve an easement by reference in the deed to a plat or survey, "an individual looking at that plat or certificate of survey must be able to ascertain, with reasonable certainty, the depicted easement's use or necessity and the intended dominant and servient tenements."